

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

PREMIER GAMING MANAGEMENT, INC.
Plaintiff

V.

NO. 4:97CV195-B-B

RAINBOW ENTERTAINMENT, INC.
Defendant

MEMORANDUM OPINION

This cause comes before the court upon the plaintiff's motion for judgment on the pleadings, or alternatively, for summary judgment. The defendant has failed to respond. Upon due consideration of the plaintiff's memorandum and exhibits, the court is ready to rule.

FACTS

The defendant has not responded to the plaintiff's motion for summary judgment and thus, the plaintiff's recitation of the facts is uncontroverted. Therefore, the court will accept the plaintiff's statement of facts as true, except where the record reveals a factual dispute clearly apparent to the court. See Carpenter v. Gulf States Mfrs., Inc., 764 F. Supp. 427, 429 (N.D. Miss. 1991). While the court may not grant summary judgment by default simply because the defendant has failed to respond, Id., (citing Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985)), the court may accept the movant's uncontroverted statement of facts and grant summary judgment where appropriate. Carpenter, 764 F. Supp. at 429 (citing Eversly v. Mbank Dallas, 843 F.2d 172, 174 (5th Cir. 1988)).

On May 6, 1996, the parties executed a settlement agreement and mutual release in a lawsuit that was pending in the United States District Court for the Western District of

Tennessee. That suit involved an alleged breach of contract under which the plaintiff was to manage a casino in Greenville, Mississippi. The settlement agreement required the defendant to pay the plaintiff \$315,000.00. To date, the plaintiff has received no payment.

The plaintiff filed suit in this court on October 23, 1997, for violation of the settlement agreement, seeking liquidated damages of \$1.1 million as set forth in the agreement. The plaintiff attempted to serve the defendant through its registered agent, Charles Cato, of Greenville, Mississippi. However, the certified mail was returned unclaimed, and when the plaintiff's process server went to Cato's listed address, he found only a vacant building. Additional attempts to locate either Cato or the defendant were unsuccessful.

Unable to locate the defendant's registered agent, the plaintiff served the defendant's secretary, Sean Carothers, pursuant to Miss. Code Ann. § 79-4-5.04. Carothers answered the plaintiff's complaint, but denied that he had any personal knowledge of either the settlement agreement or the operation of the corporation. He asserted that he agreed to be listed as secretary of the corporation simply as a concession to the incorporators of the defendant.

In support of its motion, the plaintiff has submitted the affidavit of Gary Findlay, President of Premier Gaming Management, attesting to the fact that the defendant has breached the settlement agreement by failing to make any payments to Premier Gaming Management and by failing to comply with certain other terms of the agreement regarding inspection of financial records. Findlay's affidavit is uncontroverted. Since the court has considered matters outside the pleadings, the court will treat the plaintiff's motion as one for summary judgment.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L.

Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

A lengthy legal analysis is unnecessary in this particular case. The facts are not in dispute. The plaintiff has produced an apparently valid contractual agreement between the plaintiff and the defendant in which the defendant agreed to pay the plaintiff \$315,000.00 in full and complete satisfaction of all claims arising out of their previous lawsuit in the Western District of Tennessee. The defendant has failed to comply with the terms of the settlement agreement, and in particular, has failed to make any payment towards the \$315,000.00 sum. The agreement specifically states that in the event Rainbow Entertainment violates any of the material provisions of the settlement agreement, and said violation continues for more than fourteen days after receipt of written notice by Rainbow, Premier Gaming Management shall be entitled to

liquidated damages in the amount of \$1.1 million, said amount being approximately the amount sought by Premier Gaming in the underlying lawsuit in Tennessee. The plaintiff has produced evidence showing that the defendant has been given more than fourteen days notice of its breach of contract. Therefore, the court finds that the plaintiff's motion for summary judgment should be granted and that judgment should be entered in favor of the plaintiff for \$1.1 million, in addition to pre- and post-judgment interest, attorney's fees, and costs.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's motion for summary judgment should be granted. An order will issue accordingly.

THIS, the ____ day of April, 1998.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE